Nos. 21719, 21719A, 21719B, 21719C, 21719D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN A. CROSS, et al., Appellants, vs. S. S. KAIMANA, her engines, etc., et al., Appellees.	No. 21719
S. S. LANAKILA, her engines, etc., et al., Appellees.	No. 21719A
S. S. ALASKA BEAR, her engines, etc., et al., Appellees.	No. 21719B
S. S. PACIFIC BEAR, her engines, etc., et al. Appellees.	No. 21719C
S. S. COAST PROGRESS, her engines, etc., et al. Appellees.	No, 21719D

BRIEF OF APPELLEE UNITED STATES

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BRIEF OF APPELLEE UNITED STATES

Opinion Below

The opinion of the District Court is reported at 265 F. Supp. 723 (N.D. Cal. 1967).

Jurisdiction

This is an appeal from a judgment of the District Court entered on February 21, 1967. Notice of Appeal was filed on March 21, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. §1291.

Questions Presented

The basic issues involved in all five proceedings are whether Appellant-Trustees' claims for contributions to certain vacation, pension and welfare funds, which became due and owing from the shipowners, can be asserted as maritime liens and, if so, whether they are entitled to "preferred" maritime lien priority against the vessels as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953.

Statutes Involved

46 U.S.C. §599(g) - The provisions of this section shall not apply to, or render unlawful, deductions made by an employer from the wages of a seaman, pursuant to the written consent of the seaman, if (1) such deductions are paid into a trust fund established for the sole and exclusive benefit of seamen employed by such employer, and their families and dependents (or of such seamen, families, and dependents jointly with seamen employed by other employers and their families and dependents); and (2) such payments are held in trust for the purpose of providing, either from principal or income or both, for the benefit of such seamen, their families, and dependents, medical and/or hospital care, pensions or retirement or death of the seamen, life insurance, unemployment benefits, compensation for illness or injuries resulting from occupational activity, sickness, accident, and disability compensation, or any one or more of the foregoing benefits, or for the purpose of purchasing insurance to provide any one or

more of such benefits.

46 U.S.C. §953 - Preferred maritime lien; priorities; other liens.

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall

thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

Statement

Appellants herein are trustees of fifteen trusts established by collective bargaining between the Pacific Maritime Association (herein PMA) and the several unions representing crew members on American Flag vessels sailing out of West Coast ports. The trusts (herein "benefit plans") provide vacation, pension, and welfare benefits (sickness, accident, and disability compensation, medical and hospital care for seamen and their dependents, recreation and educational facilities, etc.).

At the time during which the amounts sought to be recovered by the trustees accrued and became due, Coastwise Line and Dorama, Inc., were

Steamship companies operating the five libelled vessels (T. 275:32; 276:1-14). Both companies became insolvent and without sufficient funds to make any appreciable payments to the benefit plans.

Appellee Pacific Far East Line (herein PFE) was the holder of preferred ship mortgages on SS KAIMANA and SS LANAKILA and is the owner of SS PACIFIC BEAR and SS ALASKA BEAR (T. 277: 7-15). Appellee United States was the holder of a preferred ship mortgage on SS COAST PROGRESS (T-277:15-19). Both PFE and the United States have executed their preferred ship mortgages and resist the claims of the trustees at issue here on the grounds that they have valid mortgage liens against the ships and that the trustees' claims do not have the security of a maritime lien.

The corpus of each trust or benefit plan is made up of payments made by the steamship operators to the trustees (referred to as "employer contributions") plus income on the invest-

ments of the fund by the trustees, plus, in the case of some of the Welfare Plan Trusts, contributions from the employees themselves. The employer contributions are paid directly to the trustees and never to the seamen. The seamen themselves have no right to the employers' payments into the funds (T. 287:8-10; 290:8-13).

Persons realizing advantages from these benefit plans are not solely seamen. The plans encompass union officials and other shore-based personnel having no connection with the ships involved in this litigation, or for that matter, any other ship (T.277:25-31).

In no instance has an individual beneficiary of any trust here involved been denied a benefit because of the fact that the particular sums sought to be recovered by the trustees in the present suits were not paid into the trust (T. 285:32; 286; 1-3; 290:14-30).

After trial upon a "Stipulation as to Certain Facts and Other Matters" and certain testimony and exhibits introduced at trial, the District Court held that

> . . . the trustees' claims for contributions are not entitled to the seaman's maritime lien or to preference as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953. (T.542:30-32; 543:1.)

Summary of Argument

The questions presented here are whether unpaid employer contributions to certain union benefit plans constitute maritime liens and, if so, whether they are entitled to preferred maritime lien priority as "wages of the crew of the vessel" within the meaning of 46 U.S.C. §953. Relying on United States v. Embassy Restaurant, Inc., 359 U.S. 29, 34 (1959) and Brandon v. SS Denton, 302 F.2d 404, 415 - 16 (5 Cir. 1962), the District Court answered both questions in the negative. We believe that the District Court's reliance on Embassy and The Denton was proper and that those cases are controlling herein.

ARGUMENT

(1) No jurisdiction exists since the contract underlying Appellants' action was made between the steamship companies association (PMA) and the Unions and is not a maritime contract.

The contract which is the basis of the trustees' claim for employer contributions is a contract executed by and between the shipping companies forming PMA and the labor unions (T.274:24-31). The basis of Appellants' action is not, as they suggest, a claim for the agreed compensation of seamen for the performance of maritime services. Appellants would equate employer contributions with "seamen's wages."

It is critical to recognize, as did the Trial Court, that:

> . . . the contributions in question are due and payable, not to the seamen, but to the trustees. The collective bargaining agreement expressly states that the contributions from the steamship companies are payable only to the trustees, not the employees,

> and that covered employees have no right, title, interest or claim in or to their employer's or any other employer's contributions to the trust funds. (T.537:7-14)
> (Emphasis added.)

For a claim to be recognizable in admiralty there must be a maritime connection. The necessary jurisdictional fact in seamen's wage claims is that the men perform maritime services. It is admitted herein that the seamen performed maritime services aboard the five vessels, and it is also admitted that the seamen received all wages accruing to them (Ap. Br. 28).

Appellants rely on Harden v. Gordon, 11 Fed. Cas. 480 (C.C.D. Me. 1823) (Ap. Br. 17) in arguing that admiralty jurisdiction is applicable here. In that case, the plaintiff seaman sued his employer for expenses incurred in the cure of a sickness. Clearly, the case involved a suit by a seaman for compensation for the performance of maritime services. That is not

the case before this Court. Appellants here, being unable to collect employer contributions because of the insolvency of the employers, are attempting to clothe themselves with seamen's wage lien rights in order to collect certain sums from the vessel rather than her owners. No seaman is before this Court complaining that wages are owing to him. No assignments were given to Appellants by any such seamen since the seamen in question had received all wages due to them.

Appellants seem to be urging that by a right of subrogation they are entitled to assert the seamen's wage liens in place of the seamen. But is axiomatic that the subrogee has no greater rights and remedies than the original creditor. 50 Am. Jur., Subrogation, §§110-112. It is conclusively established in this case that the seamen had no right to the employer's payments into the trust funds (T. 287:8-10; 290:8-13).

Appellees do not take issue with the proposition that one who advances money for crew's

"wages" gains the security of a lien for said sums. However, every case cited by Appellants in their opening brief, which has enforced a seaman's wage lien, was predicated upon the uncontroverted fact that monies were owing and payable directly to the seaman. These include fishing lays, statutory penalties for delayed payment, extra-hazardous duty pay, statutory extra pay for improper discharge, maintenance and cure, compensation for idle vessel, wages for broken or abandoned voyage, war bonuses, and discharge benefits.

No causes of action were vested in the seamen in our case. The seamen on the five vessels had no right to bring an action to force the employers to make contributions to the trusts. That right was vested solely in the trustees. That being the case, the contract underlying Appellants' action is the employer association/union contract which is nonmaritime in nature. No admiralty jurisdiction can arise from that contract.

The contracts here sued on are merely pre-

liminary to the contracts which give rise to a wage lien. As stated in Goumas v. Karras, 51 F. Supp. 145, 146 (S.D. N.Y, 1943), affirmed 140 F. 2d 157 (2 Cir. 1944):

> A contract to work on the ship is of course maritime ... but not a contract to procure someone so to work.

And again in Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 73 F. 2d 200, 204 (9 Cir. 1934):

> . . . Admiralty has jurisdiction over maritime contracts, but it has none over contracts leading up to the execution of maritime contracts. . . (Quoting from United Transp. & L. Co. v. New York & Baltimore T. Line, 185 Fed. 386, 389-90 (2 Cir. 1911).

The preferred maritime lien created by 46 U.S.C. §953 (a) covers only maritime liens, The J. R. Hardee, 107 F. Supp. 379 (S.D. Tex. 1952), which are themselves debts for necessaries created on the security of the ship to allow her

to continue her voyage. Piedmont Coal Co. v. Seaboard Fisheries, 254 U.S. 1, 9 (1920); The Rupert City, 213 Fed. 263, 267-268 (W.D. Wash. 1914); The Alcade, 132 Fed. 576, 578 (W.D. Wash. 1904).

The employer contributions here are not even maritime liens. The actual contract is between the man and the master of the ship, i.e., the shipping articles. The agreements between PMA and the Unions are preliminary to the actual agreement made by the seaman himself to work aboard a particular vessel and not a part of it. The Golden Sail, 197 F. Supp. 777, 779 (D. Ore. 1961).

While the dividing line between maritime and nonmaritime liens is not always sharply defined, there are some guiding principles. One of these guide lines is that preliminary agreements leading to a maritime contract are not maritime contracts themselves (and only maritime contracts can be enforced in admiralty). The rationale of this distinction is that it is capable of somewhat easy application and forms a readily discernible

dividing line, excluding from admiralty many types of claims which have a remote reference to navigation amd commerce. The Thames, 10 Fed. 848 (S.D.N.Y. 1881); Cory Bros. & Co. v. United States, 51 F.2d 1010, 1012 (2 Cir. 1931); Marchessini v. Pacific Marine, 227 F. Supp. 17 (S.D.N.Y. 1964).

There is a further distinction applicable here - does the contract relate to the actual operation of a particular vessel? This we submit was the controlling factor in the Supreme Court's decision in Ward v. Thompson, 63 U.S. 330 (1859), wherein the Court ruled that a court of admiralty has no jurisdiction of a partnership agreement involving the operation of a vessel. The court stated (63 U.S. 330, at 333-334):

> The only characteristics of a charter party to be found in this contract are that the subject of it is a ship and that libelants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be em-

ployed by him for his own profit.

See also Economu v. Bates, 222 F. Supp. 988 (S.D.N.Y. 1963).

The collective bargaining agreements from which these trusts stem do not relate to any particular vessel, specific voyage or individual seaman, nor are they signed by the individual men or masters of the ships operated by the members of PMA. They are even more remote from the management and navigation of a vessel than the agreements classed as being nonmaritime contracts in the cases just cited.

It is necessary to point out at this juncture that the jurisdictional question did not arise in the cases relied on by Appellee in the remainder of this brief since the initial actions in those cases arose from preferred ship mortgage foreclosure proceedings which are maritime in nature.

(2) It is judicially established that employer contributions to benefit plans of the type here involved are not maritime liens and are not entitled to status as "wages of the

crew of the vessel" within the meaning of 46 U.S.C. §953.

The Ship Mortgage Act of 1920, as amended, 46 U.S.C. §§911-984, was passed by Congress to give preferred ship mortgages maritime lien status and priority over all maritime liens other than those set forth in 46 U.S.C. §953. It is admitted in these proceedings that Appellees are the holders of preferred ship mortgages on the vessels in question and are entitled to assert the maritime lien rights attendant thereto. Concisely stated, Appellants' sole contention is that the payments due from the now defunct shipowners to the trustees of certain benefit plans fall within the meaning of "wages of the crew" as used in 46 U.S.C. §953, and accordingly, are entitled to priority over the mortgage liens of Appellees. Appellants' contention has been unanimously rejected by the reported cases.

The precise issue here involved has been the subject of litigation in a series of cases decided during the past six years. Each case has held that employer contributions to seamen's benefit

plans do not attain maritime lien status. See:

Brandon v. The Denton, 302 F.2d 404 (5 Cir. 1962), affirming 1960 A.M.C. 2264 (S.D. Texas 1960);

The Ozark, 304 F.2d 717 (5 Cir. 1962);

The Kingston, 1961 A.M.C. 1321 (S.D. Texas 1961);

The Golden Sail, 197 F. Supp. 777 D. Ore. 1961).

The Appellants would have this Court reject The Denton since it was premised (they say) on the ground that the lien for wages of the crew extends only to wages specified in shipping articles. Nothing could be further from the truth. It happened that in The Denton articles existed and the Court's remarks had to include that contingency. The case bears extensive comment.

In The Denton the Court reviewed the nature of the payments by the employers and the basic features of these plans, which for all practical purposes are the same as those in the case at bar, but distinguished these "contributions" from the

"wages of seamen" which the Court recognized as occupying a unique status and having historically been given high priority and even the most stringent, detailed and definite protections by Congress (See 46 U.S.C. §§541-646). The Court held that "wages of seamen" are the amounts named in the written shipping articles. 302 F.2d 404 at 416. Further, the Court noted that Congress had specifically provided for the situation where a seaman himself might give written consent for deductions for fringe benefit plans. 302 F.2d 404 at 416; 46 U.S.C. §599(g); Section (5), infra.

The Court in The Denton observed a number of distinctions between the actual wages of the men and the employer contributions. The following quotation amply demonstrates some of the differences observed (302 F.2d at 415-416):

> The liability of the employer to the funds results from its agreement with the respective unions. Each of the agreements provides that the employer has a personal obligation en-

forceable by a "proceeding at law, in equity, or in bankruptcy." None make reference to proceedings in admiralty. The employer's payments are made directly to trustees who have complete control of the funds. There is nothing in any of the agreements to connect any particular money paid by the employer to a particular seaman on a particular vessel. No effort was made to provide for deductions from the wages of a seaman pursuant to his written consent as is permitted by 46 U.S. Code, Sec. 599(g) (Footnote omitted). Each plan provides that the payments by the employer may be used for the purpose of paying administrative costs of the operation of the plan. The plans are not set up separately for the T/S DENTON, but many employers make payments to a single plan. If one employer fails to pay, his default must be made good by the

other employers. A seaman receives his benefits regardless of whether his employer makes his payments to the plan.

The similarity of the findings in <u>The Denton</u> and the situation here presented is apparent. The Court also cited <u>United States</u> v. <u>Embassy Restaurant, Inc.</u>, 359 U.S. 29 (1959), for purposes of comparison. 302 F.2d at 416.

The decision in <u>The Denton</u> became the rule in the Fifth Circuit and was dispositive of the identical issue in <u>The Ozark</u>, 304 F.2d 717 (5 Cir. 1962). In an earlier case in the Fifth Circuit, <u>The Kingston</u>, 1961 A.M.C. 1321 (S.D. Tex. 1961), a Commissioner's Report had reached the same conclusions, citing and applying the reasoning of the Supreme Court in <u>United States</u> v. <u>Embassy Restaurant, Inc.</u>, <u>supra</u>, (1961 A.M.C. 1321, 1345-1347). A review of <u>The Kingston</u> is worthwhile, for the Commissioner went into various facets of these plans and demonstrated why employer contributions to plans of this type are so different from wages of seamen as contemplated by Congress

in 46 U.S.C. 953(a)(2). The Commissioner noted, _inter alia_, (1961 A.M.C. 1321, 1343-1345), that none of the employees contributed to the plans and that the amounts of the payments made by the companies were determined by the trustees. The men were paid benefits when eligible, even though the employer did not contribute to the fund in sufficient amounts, and contributions went into a general fund with no further identification as to the individual seaman. The seamen themselves did not sign the trust agreements (See Section 5, _infra_). The plans covered certain parties, such as masters, who have no maritime liens for wages, and under one plan, persons not part of the regular crew were beneficiaries (See Section 4, _infra_).

The Commissioner cogently stated (1961 A.M.C. 1321, 1344-1345):

> In general, then, the various funds are created by contractual arrangement between the steamship companies and the unions as collective bargaining

agents. In fact, if no contributions are made to a fund, a man is still entitled to benefits, and some benefits paid out undoubtedly would have to come from the payment made to such funds by <u>other companies</u>. It is difficult to see how such general funds out of which are paid administration and operating expenses and in which seamen have no vested rights, have any relation to maritime liens. Rather the agreements give rise to rights that sound of <u>in personam</u> remedies against the various owners of the defunct steamship companies for delinquent payments based on contract.

In the Ninth Circuit the issue was squarely met by the District Court of Oregon in <u>The Golden Sail</u>, 197 F. Supp. 777 (D. Ore. 1961). Again it was held on fundamentally the same reasoning that was applied in <u>The Denton</u> and <u>The Kingston</u> that the employer contributions are not wages of seamen under 46 U.S.C. §953.

The _Embassy Restaurant_ case, 359 U.S. 29, cited in _The Kingston_, _supra_, was also considered by the Court in _The Golden Sail_, _supra_, 197 F. Supp. at 778. While the Supreme Court case did not involve seamen's wages, it dealt with a similar problem: whether employer contributions to a union welfare fund were wages due to workmen entitled to priority under §64 (a)(2) of the Bankruptcy Act, 11 U.S.C. 104(a)(2). A reading of the case indicates that basically the same arguments raised by the trustees in this proceeding, and considered in the earlier cases just discussed, were raised in the Supreme Court. The Supreme Court concluded that these contributions were obligations of the employer to contribute sums to the trustees of the plan, not to its workmen, and were enforceable only by the trustees, who enjoyed sole title and exclusive management of the funds. 359 U.S. at 33.

The Supreme Court also made another observation that has equal validity in this proceeding. It pointed out that if the claims of trustees were to be treated on a par with wages in a case where the employers' assets were in-

sufficient, the workmen claiming actual unpaid wages would have to share with the welfare plan, thus reducing the workmen's recovery. 359 U.S. at 33-34. The same reasoning would apply in the case of priorities under the Ship Mortgage Act. Expanding the class given the priority in a case of insufficient proceeds in the Registry representing the vessel after her judicial sale would reduce the individual recoveries of the seamen.

The admiralty cases previously cited are, we submit, in point, dispositive of the issue, and fully accord with the Supreme Court's reasoning in the Embassy Restaurant case.

Appellant Trustees rely on United States v. Carter, 353 U.S. 210 (1957) in which the Court held that trustees of welfare trusts similar to those involved herein could recover against the surety for unpaid contributions due to the trust funds from the contractor under the contractor's payment bond given pursuant to the Miller Act, 49 Stat. 793; 40 U.S.C. §§270a-d (1964). However, the Court in Embassy

has clearly distinguished Carter, stating at 359 U.S. at 34-35:

> Nor does the Carter case, supra, support the granting of a priority to these contributions. There we dealt with the Miller Act, which granted to every person furnishing labor or material the right to sue on the contractor's payment bond "for the sum or sums justly due him." The contractor defaulted and the trustees of a welfare fund similar to that involved here sued on the bond for recovery of contributions "justly due." Our opinion did not hold that contributions were part of "wages ... due to workmen." In fact we pointed out that the trust agreement provided that the contributions "shall not constitute or be deemed to be wages," id., at 217. The Act having the broad protective purposes of securing all claims that are "justly due", we held that the trustees might recover. In short, though

> the contributions were not wages, they were "justly due" as a claim within "the purposes of the Miller Act." Under the Bankruptcy Act, however, not all claims "justly due" have priority. They must be within a class, such as "wages ... due to workmen." The claims here are not. If this class is to be so enlarged, it must be done by the Congress.

As the <u>Carter</u> and <u>Embassy</u> cases read together make clear, the test is not whether the claims for the contributions are made on behalf of the employees, but whether the claims are of such a nature as to come within the protection of the seaman's lien for wages considered either in the traditional or statutory sense.

(3) <u>Collective bargaining for a mislabelled "wage package" does not give Appellants a seaman's lien for wages.</u>

Appellants have urged that the fruit of employer/union collective bargaining in the maritime

field is a "wage package." The term "wage package" is the invention of Appellants for the purpose of this litigation. The proper designation, as expressed by witness J. Paul St. Sure, is "cost package" (R.T. 72:24; 74:7; 90:21; 93:6-11). The use of the term "package" at all is dictated by convenience and without any attempt to affect the various items included in it.

Frequent reference to the "wage package" has little relevance to this proceeding, for the problem is what the term "wages" has been construed to mean in maritime lien law, and in particular, under the Ship Mortgage Act. The fact that under some statutes [Davis-Bacon Act, 40 U.S.C. §267 a(b) and the Miller Act, 40 U.S.C. §270 b(a)] fringe benefits are taken into account in equalizing the compensation paid to state or federal workers with that of employees in private industry is not determinative of the issues before this Court. Even the characterization of fringe benefits under a general classification of wages by the Maritime Administration

was explained by Appellants' witness James S. Dawson, Jr., as "purely an administrative means of determining the amount of subsidy due and should not be construed to mean that such items are in fact wages." (Trust Ex. 4, pp. 6-7).

It cannot be denied that the "package" which Appellants emphasize contains different items, one of which is wages and another of which is fringe benefits. The question is whether the employers' contributions for fringe benefits enjoy the status of the former in maritime law. The cases say no. The trustees' attempt to attain wage lien status for employer contributions by analogizing them with wages is in direct violation of the principle established in the cases cited in Section (2), <u>supra</u>.

(4) <u>The trust funds include employer contributions for the benefit of masters and shoreside personnel, neither of whom can assert a seamen's wage lien.</u>

It is admitted that the trust funds in question receive employer contributions for the

benefit of masters and certain shoreside personnel (T.277:25-31).

Without question, a master has no lien for wages. Steamboat Orleans v. Phoebus, 36 U.S. 175 (1837); Norton v. Switzer, 93 U.S. 355, 365 (1876); The Maret, 145 F.2d 431 (3 Cir. 1944); The Putnick, 291 Fed. 902 (W.D. Wash. 1923); United States v. The Pomare, 92 F. Supp. 185 (D. Hawaii 1950). Appellants do not urge, as indeed it would be preposterous to urge, that a shoreworker may have a "seaman's wage lien." Allowing the trustees to recover these employer contributions under the guise of "seamen's wages" would violate basic admiralty law.

(5) If the employer contributions are held "seamen's wages", the applicability of 46 U.S.C. §599(g) would preclude Appellants' recovery on the grounds of illegality.

The provisions of 46 U.S.C. §599(g) are clear. No deductions or allotments may be made by the employer from the "wages of a seaman" unless the seaman expresses his written consent thereto. No such written consent was given by

any seamen involved in this case. Should the employer contributions be held "wages of seamen", it follows that all monies poured into the trusts over the years have been illegal payments. Appellee does not so urge. On the contrary, since the employer contributions are not "wages of seamen", the funds were legally collected by the trusts.

This fact is especially important when it is realized that four of the trusts here involved have provisions for "employee contributions" based upon the personal signature of the employee. It is fair to say that signatures were disregarded in the case of the employer contributions since the trusts initially did not regard these employer contributions as "wages of seamen".

(6) Any alteration of the existing statutory maritime lien law should be left to the Congress.

As pointed out in Section (2), supra, the Ship Mortgage Act of 1920 was enacted to give investors in the merchant marine a high degree

of security on their investments. The preferred ship mortgage lien was given priority over all maritime liens other than those enumerated in 46 U.S. C. §953. Without question Appellees hold preferred ship mortgage maritime liens.

Appellants here urge that employer contributions to trust funds are "wages of the crew" and entitled to the priority described in the statute. There is absolutely no precedent for extending "wages of the crew" as used in the statute to include employer contributions of the type here involved.

"Wages of the crew" are entitled to a priority because they must be paid to keep the ship in operation and, for that reason, benefit even the mortgagee. If wages are withheld from the crew, the ship will undoubtedly be forced to stop operating and the mortgagee will be apprised of the situation in time to take whatever legal steps are necessary. Allowing the ship to incur wage liens under the guise of employer contributions to benefit plans will make the ship a float-

ing credit card in this respect, all to the detriment of the mortgagee whom Congress intended to protect. Any liberalization of the statutory preferred maritime lien should be undertaken only in the most warranted of situations or by the Congress.

CONCLUSION

The attempt by Appellant Trustees to classify their claims for employer contributions as seamen's wage liens must fail because:

(1) The underlying contract on which Appellants' claims rest is the steamship association/union agreement and not a maritime contract giving rise to jurisdiction in this case.

(2) The existing law on the subject is unanimous in denying wage lien status to such claims by trustees.

(3) The Trustees' claims lack identity with the seamen and the ships so as to fail as *in rem* rights. If anything, they are *in personam* obligations of the operators of the vessels and not maritime liens

at all, much less "preferred" maritime liens.

(4) The trust agreements expressly state that the employer contributions are not to be considered as "wages of seamen".

(5) The trust fund corpus includes payments made on behalf of masters and shore-side personnel, none of whom could assert a "seaman's wage lien."

(6) The employer contributions cannot be held as seamen's wages without the trusts having violated 46 U.S.C. §599(g).

(7) Any change in the existing statutory law should be made by the Congress.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and in my opinion the foregoing brief is in full compliance with those rules.

Gerald A. Falbo

GERALD A. FALBO, Attorney

CERTIFICATE OF SERVICE

I, Gerald A. Falbo, attorney for Appellee United States of America, certify that on this date I served copies of the foregoing Brief of Appellee United States as indicated below on Appellants John A. Cross, et al., and Appellees Pacific Far East Lines, Inc., by inserting said copies in an envelope, properly stamped and deposited in the United States Post Office, and addressed to:

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Subscribed and sworn to before

me this 2d day of May 1968.

C. C. EVENSEN

Deputy Clerk, U. S. District Court
Northern District of California